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## Domestic Violence in Criminal Courts: The Larger Implications for Victims

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## Introduction: Domestic Violence in Canada

The current means of addressing domestic violence in Canada's criminal justice system is cause for major concern. Academics have considered the treatment of domestic violence in Canada inadequate (Bell, Perez, Goodman, and Dutton 2011) and "...an indicator of society's inattentiveness to violence against women..." (Garner and Maxwell 2009, 44). By 2015, approximately one-quarter of all police-reported crimes was intimate partner violence (Sinha 2015). After reviewing reports from 5 countries, Garner and Maxwell discovered that "...about one third of the reported offenses and more than three fifths of arrests result in the filing of charges..." and that "...more than half of all prosecutions result in a criminal conviction" (2009, 44).

Brown suggests a growing trend of victims being increasingly satisfied with the prosecution and police tactics and policies (2002, 3). While this may be accurate, Van Wormer notes that there is still "...widespread dissatisfaction by battered women ... and their advocates with the current system..." (2009:107). This illustrates that a majority of victims did not experience the treatment or results that they had hoped for through the courts. While criminal proceedings alone cannot solve the issue of domestic violence, it "...has the potential to play an important part in victims' recovery..." in a number of ways (Bell, Perez, Goodman, and Dutton 2011, 72), or can lead to secondary victimization (Parsons and Bergin 2010; Orth 2002).

While much of the literature focuses on early aspects of the criminal justice system (police action, decision to prosecute, for example), few authors have sought to understand victims' opinions about the trial process (Hare 2010; Smith 2001). This paper conducts a literature review to analyse the practical reality of how the trial process of Canadian criminal courts affects victims' well-being in domestic violence trials. Overwhelmingly the literature suggests courts inadequacy when addressing domestic violence. As such, this paper suggests policy implications to better serve victim needs while maintaining proper administration of justice.

## Defining Domestic Violence

Domestic violence, as defined in Ontario by the *Domestic Violence Protection Act* [2000], is any "...acts or omissions committed against an applicant, an applicant's relative or any child:

- (1) An assault that consists of the intentional application of force that causes the applicant to fear for his or her safety, but does not include any act committed in self-defence.
- (2) An intentional or reckless act or omission that causes bodily harm or damage to property.
- (3) An act or omission or threatened act or omission that causes the applicant to fear for his or her safety.
- (4) Forced physical confinement, without lawful authority.
- (5) Sexual assault, sexual exploitation or sexual molestation, or the threat of sexual assault, sexual exploitation or sexual molestation.
- (6) A series of acts which collectively causes the applicant to fear for his or her safety, including following, contacting, communicating with, observing or recording any person.” (Section 1(2))

The Canadian Resource Centre for Victims of Crime identified four types of services available for victims in Canada – police-based, crown-/court-based, community-based, and system-based. Police-based services address victim needs in the immediacy of crime; crown-/court-based services assist victims through the trial process; community-based services address the aftermath of the crimes impact; and the system-based services addresses a wide range of needs from one central location (2007, 22). In addition to these available services, victim rights have been enshrined federally in the *Canadian Victims Bill of Rights*, the *Criminal Code of Canada*, and the *Corrections and Conditional Release Act*. Yet with all the rights and services available to victims of domestic violence, there is still widespread dissatisfaction with the criminal justice system (Van Wormer 2009).

## **Barriers for Victims**

In order to understand and begin to address this dissatisfaction, it is important to understand victims’ barriers to accessing justice. An appreciation for social and structural factors is necessary to best “...understand the decisions women make when facing a violent partner” (Velonis et al. 2017). These social and structural factors include poverty, sexism, and barriers related to disability

(Velonis et al. 2017). Stanbridge and Kenney note that victim-advocate groups need to “...properly manage, display, and frame the strong emotions associated with the victim experience – grief, fear, injustice, and anger – to maintain the internal integrity of the group as well as its external or public legitimacy” (2009, 473). Victims, however, continue to repeatedly face systemic obstacles to accessing resources that could improve their satisfaction with the criminal justice system and hinder service-providers ability to support them (Dichter et al. 2011; Fugate et al. 2005; Palmer et al. 2016; Bennnett, Goodman, and Dutton 1999; Fugate et al. 2005).

Addressing victim needs is vital to effective prosecution of domestic violence. Therefore, it is important to understand the reasons why a victim who initially comes to the criminal justice system for assistance changes their mind about prosecution (Bennnett, Goodman, and Dutton 1999; Cammiss, 2006). One reason is that trial proceedings can be very confusing for victims of crime (Bennnett, Goodman, Dutton 1999; Gillis, et al., 2006; Bell et al. 2011; Fugate et al. 2005; Sheehy 2014; Department of Justice 2015). This lack of clarity, often caused by stress, distractors (such as children) and fear of safety, hinders the victims’ ability to retain information received by service-providers regarding how to maneuver through the trial process (Bennnett, Goodman, Dutton 1999, 766-767). This issue persists through the entire legal process and results in “...significant distress” for the victim (Gillis et al. 2006, 1156). Another issue is a lack of clarity of how victims can enforce court orders (Bennnett, Goodman, and Dutton 1999). Bennnett, Goodman and Dutton (1999) note that victims may not fully understand what to do if the accused violates a court order and may therefore begin to believe that the criminal justice system is ineffective.

Further, victims note that a plethora of emotions “...toward their abusive partner, including love, sadness, anger, fear, guilt, and pity...” (Gillis et al. 2006, 1156), often causes victims to remove themselves from the proceedings (Bell et al. 2011). The combination of the emotional and financial ties between the victim and offender may also leave the victim with no reasonable alternative to not cooperate with officials (Konarski 2003). This reality, coupled with the lengthy trial process, increases the frustration with (Bennnett, Goodman, and Dutton 1999; Fugate et al. 2005), and anxiety towards the criminal justice system (Bellet al. 2011). Additionally, victims of domestic violence often live in fear due to the potential repercussions of involving the judicial system and the fear of retaliation if the accused is released on bail or if charges are dropped (Bennnett, Goodman, and Dutton 1999; Fugate et al. 2005; Department of Justice, 2015). These fears appears to be warranted (Sheehy, 2014), as some victims reported being victimized again within three months of the accused being released (Bennnett, Goodman, and Dutton 1999). To combat this, some propose “[c]ombining

structured risk assessments and victim risk assessments...” in order to glean the “...unique and complementary information” that each provides to properly understand the risk to the victim and their family (Connor-Smith et al. 2011, 2517). It’s clear that victims of domestic violence “...continue to face difficulties in the legal-judicial system that impair its usefulness as a resource for their protection” (Gillis et al. 2006).

Victims’ role in trial is “...supported by rights to information, participation, protection and to seek restitution” (Office of the Federal Ombudsman for Victims of Crime n.d.). Victims of domestic violence, however, are seldom asked their views on the helpfulness and hindrance of certain parts of the criminal justice system (Bell et al. 2011). Without the opinions of those stakeholders directly involved in the process, the effectiveness of the criminal justice system cannot be enhanced. Approximately three-quarters of Hare’s (2010) participants expressed support for formal action in the early stages of criminal justice system, yet just over one-third expressed support for a trial. This finding alone illustrates that the criminal justice system is not satisfying victim needs.

Taylor-Dunn (2016) discusses the potential value of specialist victim advocacy for cases of domestic violence. Since the criminal justice system offers victims little flexibility, “...understanding victim preferences is critical for informed decision making about how to respond to domestic violence” (Wemmers and Cousineau 2005, 504). Moreover, to achieve effective prosecution of domestic violence, there needs to be a less patriarchal society in order to best prosecute offenders (Cowan 2014; Dempsey 2007). Kingsnorth and Macintosh further suggest that males are “...less likely to rely on the criminal justice system when confronted with intimate violence” (2004, 322).

## **The Trial Process**

In many jurisdictions in North America, prosecutors rely heavily, or even solely, on the testimony of victims during their prosecution of cases involving domestic violence (Hanna 1996; Dichter et al. 2011). However, as Hanna notes, reliance on victim testimony alone “...reinforces the notion that domestic violence is a private matter, only affecting the victim” (1996, 1899). Dichter et al. (2011) note that female victims wanted action toward prosecution to be taken without their case being greatly dependant on their active participation.

Victim reluctance to cooperate with the criminal justice system in prosecuting domestic violence cases “...implies that there are ways in which the court is not meeting victims' needs.” (Bennett, Goodman, and Dutton 1999, 761). In order to achieve more effective prosecution of domestic violence cases then, it is apparent that addressing victim needs could lead to increased participation and therefore increased conviction rates. Further, the choice of prosecution can be moved away from the victim (Ford 2004) if the state wishes to clearly identify how unacceptable domestic violence is (Hanna 1996) as the prosecutors’ goal should be to end the domestic violence (Kinports 2014).

Kingsnorth and Macintosh (2004) posit an expansion of Rational Choice Theory to apply to victims of domestic violence in order to explain their decisions to support, or not, prosecution of their partner. Hare (2010) identified 71 reasons why the majority of victims do not support trials. Hare (2010) found that 43% of participants had experienced interactions with the accused in an attempt to keep them from prosecuting, including displays of threats, promises or actions. Further, Hare noted that 43% of respondents felt “extremely afraid” of their partner during throughout this experience (2010 768). Individual factors, such as psychological or mental health reasons for themselves or their family, accounted for just under one-fifth of all reasons given by victims of domestic violence as to why they did not want a trial (Hare 2010). Cala, Trigo and Saavedra expand on individual factors, noting that disengagement from legal procedures can occur by evaluating the degree to which the victim is supported, contact with the perpetrator, “the expectation of going back with ... [the perpetrator]”, and a feeling of guilt (2016, 41).

Relational factors, including the fear of retaliation, financial dependence, and emotional connection to the batterer, were also identified as reasons for opposing trials (Hare 2010). Institutional factors, specifically “...dissatisfaction with the [criminal justice] process” were also identified by participants as a reason for not supporting the trial (Hare 2010, 772). Additionally, “...societal and cultural beliefs about traditional gender roles as well as religious worldviews...” by victims of domestic violence also arose as a theme among some victims (Hare 2010, 772).

For those participants who did support trial, their reasons overwhelmingly focused on the retributive effect of the criminal justice system (Hare 2010). Noting that “...victims with more serious injuries from the incident strongly wanted to go to trial”, Hare’s work hints at the idea of a linear relationship between the seriousness of the crime and the likelihood of support for trial (Hare 2010, 774). This is further expressed by victims goal of incapacitation from the trial, which was identified by Hare (2010) resulting from fear for themselves or their families. Further, Hare also notes that numerous victims wished to gain

“...public acknowledgement of the crime” by proceeding to trial (2010 773). Noting that some victims wanted rehabilitation to occur as a result of the trial, most of these victims also combined this with a hope for retribution or deterrence (Hare 2010). Some victims face a multiplicity of emotional, physical, and financial obstacles to proper engagement with the criminal justice system, especially if victim testimony is the primary evidence utilized by prosecutors. As such, prosecution of domestic violence without the need for active victim participation should be discussed. By reducing the need for victims to testify, prosecution rates may increase and give victims more autonomy in their engagement with the criminal justice system.

### **Working Towards Reduced Reliance on Victim Testimony**

There is the potential to reduce the reliance on victim participation in criminal proceedings, if they so choose. To do so, prosecutors must start to rely more heavily on extrinsic evidence to corroborate the victims experiences (Hanna 1996). Extrinsic evidence can come in a variety of forms and, to be effective, should be explained to social services that deal regularly with victims of domestic violence (Shepard 2005). Effective cooperation between a variety of victim services appears to be positively associated with effectively addressing domestic violence in and out of the courts (Shepard 2005). Westera identified three strategies to reduce reliance on victim participation: “...improving the quality of investigations by initial police responders, supporting the complainant and tailoring the trial process to the domestic violence context” (2017 157).

During investigation of domestic violence offences, extrinsic evidence, ranging from the effect on the victim (medical treatment and 911 calls, for example) to collateral damage at the crime scene (such as weapons, broken bottles or damaged household furniture, for example) should be photographed or collected as evidence by police departments (Hanna 1996). Other efforts that can reduce the reliance on victim active participation are to “...identify all possible sources of corroboration, whether by witnesses, diaries, medical and psychological records, photographs, and phone records...” (Sheehy 2014).

A proactive method to future prosecution of domestic violence cases could occur by community-based services transferring knowledge about strategies to document abuse for victims. Sheehy suggests that victims make notes in a journal illustrating a narrative of the abuse that they suffer from (2014, 311). These

written accounts have the potential to corroborate the testimony and improve any contradiction and confusion with the victims' testimony (Sheehy 2014). By community based-services working with prosecutors to inform victims of effective ways to document abuses, victim testimony may not necessarily be required to secure a conviction.

During the trial process, measures must be taken to support victims and maintain their integrity while engaging with the criminal justice system. The preventing of questioning by self-represented accuseds against vulnerable victims is one such example (*Criminal Code of Canada*, Section 486.3). While there is a growing awareness that certain vulnerabilities can "...make it difficult for a witness to provide a full and candid account while testifying", the application of testimonial aids such as section 486.3 of the *Criminal Code* is quite rare (Department of Justice 2016). Court-based services, however, are simply unable to keep up with the growing need for victim services. As Hare (2010) noted, support for victims is one of the major factors for their satisfaction with the criminal justice system along with their support for the trial. Without working to improve support through victim services, victims of domestic violence experience difficulty understanding, moving forward, and supporting, the prosecution of their partner.

## Conclusion

While there is an overall dissatisfaction with the criminal courts response to domestic violence (Van Wormer 2009), a trend towards officials taking victim input and opinion into consideration has started to address this issue. Ensuring a positive experience throughout the trial is important to maintain victims' faith in the criminal justice system. By not factoring in victim experiences, courts run the risk of making the victim "...less likely to report offenses or approach courts for help in the future" (Bell et al. 2011, 72). When victims decline to participate in the adjudication of justice, the criminal justice systems ability to reduce recidivism is limited (Konarski 2003). By understanding and appreciating victims lived experiences at trial, courts can work towards creating an environment more conducive to victim empowerment and safety, therefore improving victims' faith in the criminal justice system. This, in turn, should begin to illustrate that the criminal justice system takes domestic violence seriously and reinforce to victims that its perpetration is not acceptable in any circumstance.



## **Policy Implications**

This paper discusses some of the limitations the Canadian criminal justice system faces when prosecuting domestic violence. Victim empowerment is one method to improve satisfaction with the criminal justice system, but "...appears most effective when tailored to the individual needs of the victim" (Konarski 2003, 104). As such, Konarski suggests that adequate staffing and funding for victim support programs is of "critical importance" (2003, 104). Adequate staffing could ensure that victims get the support they deserve at trial, as well as outreach and follow-up if needed (Konarski 2003).

As Bell et al. note, victims reported feeling "...anxious and confused about the process, receive insensitive and dismissive responses from court personnel, and encounter difficulty in securing the issuance or enforcement of sanctions" (2011, 73). By ensuring victim support programs are able to spend an appropriate amount of time with clients, victims may experience reduced confusion, anxiety, and feelings of being dismissed. Other authors also reiterate this potential, illustrating that victims want court staff to provide them with more information and resources (Bell, Perez, Goodman, & Dutton, 2011), as well as expressing a "...strong need for a more supportive court process in general" (Gillis et al. 2006, 1162).

Additionally, prosecutors must work towards reducing reliance on victim testimony. While testimony can bolster the case, forced participation can result in secondary victimization for victims. Moreover, without extrinsic evidence being gathered and introduced, prosecutors ability to gain a conviction without victim testimony is greatly diminished. This reinforces the belief that domestic violence is a private matter and that the criminal justice system is not equipped to address it. This may contribute to reduced confidence in the criminal justice system and, further, in the failure of victims to report crimes to police.

Another issue identified by many victims referred to the actual court process. While certain features of the trial "...are not readily amenable to intervention" because of the adversarial nature of the judicial system (Bell et al. 2011, 83), there are some issues that could be improved upon. Many female victims express that they "...were further traumatized by ambivalent or discriminatory attitudes and practices prevalent within the system" (Gillis et al. 2006, 1163). This issue could be addressed through mandatory training of the effects domestic violence for court officials. Many victims also identified frustration that occurred "...when their voice got lost in the process" (Bell et al. 2011, 79). This issue could be addressed to some degree by having victim support

staff or advocates available at court to explain the process and help ensure the victims voice is heard within certain processes within the trial.

Another important area of discussion regarded the judiciary's actions during the trial process (Belknap and McDonald 2010). The judge's tone when dealing with domestic violence cases has a substantive effect of how victims perceive their experience at court (Bell et al. 2011). A judge's strict denunciation of the abuse was found to enhance victims' experiences in court (Bell et al. 2011). If the matter is taken lightly by the judge, however, victims may perceive this as reinforcing the fact that the perpetrator can get away with the abuse with little to no consequences (Bell et al. 2011). Moreover, the courts disposition also affects victims experience and support for the criminal justice system (Bell et al. 2011). When compliance to court orders was clearly outlined and defined by the judge, victims overall felt supported by the court (Bell et al. 2011). Court intervention, however, was often not enforced and thus could illustrate to perpetrators of domestic violence that the consequences are "...a joke" (Bell et al. 2011, 78).

## **Appendix 1: Resources Available to Victims**

### **National Services:**

- [National Clearinghouse on Family Violence \(NCFV\)](#)
- [Family Violence Initiative \(FVI\)](#)
- [Spousal and Partner Abuse – It can be stopped \(RCMP\)](#)
- [Dating Violence – RCMP](#)
- [Centre for Research on Violence Against Women and Children](#)
- [Department of Justice – Family Violence Initiative](#)
- [Department of Justice – Inventory of Spousal Violence Risk Assessment Tools Used in Canada](#)
- [Characteristics of Women Offenders of Domestic Violence](#)
- [Violence Against Women – Health Canada](#)

### **Provincial Services:**

#### **British Columbia**

- [Directory of Victim Services in British Columbia](#)
- [An Online Resource for Victims and Witnesses of Crime in BC](#)

#### **Alberta**

- [Family Violence](#)
- [Family Violence Prevention](#)
- [The Alberta Relationship Threat Assessment and Management Initiative \(ARTAMI\)](#)

#### **Saskatchewan**

- [Fact Sheet – Regina Domestic Violence Court](#)

#### **Manitoba**

- [Domestic Violence Support Service \(DVSS\)](#)
- [Domestic Violence and Stalking](#)
- [The Canadian's Women's Health Network – Domestic Violence in the LGBT\\* Community \(Lesbian, Gay, Bisexual and Trans\)](#)

## Nunavut

- Community Justice

## Ontario

- Office for Victims of Crime (OVC)
- Domestic violence and family arbitration
- Domestic Violence Court (DVC) Program
- Partner Assault Response Programs
- The Men's Project
- Eastern Ottawa Resource Centre
- Victim Services of Peel

## Québec

- Crime Victims Assistance Centre
- Resources
- Fédération de ressources d'hébergement pour femmes violentées et en difficulté du Québec (in French only)
- Quebec Native Women Inc.
- Shield of Athena
- Regroupement provincial des maisons d'hébergement et de transition pour femmes victimes de violence conjugale (in French only)
- S.O.S Violence conjugale (in French only)
- Centre d'intervention en abus sexuels pour la famille (in French only)
- Viol Secours (in French only)

## New Brunswick

- Family Violence
- Publications Abuse and Violence
  - Women Abuse
  - Child Abuse
  - Information for Immigrant Women
  - Family Violence Prevention in Aboriginal Communities

## Nova Scotia

- Intimate Partner Violence

Prince Edward Island

- Victim Services

Newfoundland and Labrador

- Violence Prevention Initiative

Yukon

- Victim Services / Family Violence Prevention Unit

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